

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 3:18-09
v.	)	
	)	JUDGE KIM R. GIBSON
WILLIE GENE GULLEY, Jr.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Before the Court are the Motion to Suppress Evidence (ECF No. 46) and Supplemental Motion to Suppress Evidence (ECF No. 76) filed by Defendant Willie Gene Gulley, Jr. The United States filed a Response in Opposition. (ECF No. 77.) The Court held a suppression hearing on April 24, 2019 (*see* ECF No. 80), and the parties submitted post-hearing briefs. (ECF Nos. 85, 90.) Accordingly, Mr. Gulley's Motions are ripe for disposition. For the following reasons, the Court will **DENY** Mr. Gulley's Motions to Suppress. (ECF Nos. 46, 76.)

**I. Background and Procedural History**

On May 8, 2019, a grand jury seated in the Western District of Pennsylvania returned a two-count Indictment against Mr. Gulley. (ECF No. 19.) The Indictment alleges that:

- (1) On or about March 1, 2018, in the Western District of Pennsylvania, the defendant, Willie Gene Gulley, Jr., did knowingly, intentionally, and unlawfully distribute less than one hundred (100) grams of a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance . . . in violation of Title 21, United States Code Sections 841(a)(1) and 841(b)(1)(C); and that
- (2) On or about March 20, 2018, in the Western District of Pennsylvania, the defendant, Willie Gene Gulley, Jr., did knowingly, intentionally, and unlawfully distribute less than one hundred (100) grams of a mixture and

substance containing a detectable amount of heroin, a Schedule I controlled substance . . . in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

(ECF No. 19 at 1-2.)

Mr. Gulley was initially represented by appointed counsel R. Damian Schorr. (ECF No. 12.) Attorney Schorr filed a Motion to Suppress on Mr. Gulley's behalf. (ECF No. 46.) Attorney Schorr withdrew his appearance prior to the Court holding a suppression hearing on this Motion. (ECF No. 68.)

Mr. Gulley then retained Attorney Sandra Thompson. (ECF No. 66.) Attorney Thompson filed a Supplemental Motion to Suppress Evidence on Mr. Gulley's behalf. (ECF No. 76.) The United States filed a Response in Opposition. (ECF No. 77.) The Court held a suppression hearing on April 24, 2019 (*see* ECF No. 80), and the parties submitted post-hearing briefs. (ECF Nos. 85, 90.)

In his Motions to Suppress, Mr. Gulley argues that the Government illegally intercepted wire and oral communications between Mr. Gulley and a confidential informant. (ECF No. 46 at 2; ECF No. 76 at 4.) Mr. Gulley alleges that any evidence obtained as a result of the intercepted wire and oral communications must be suppressed because the Government's surveillance violated the Federal Wiretap Act and Pennsylvania's Wiretap and Electronic Surveillance Control Act. (ECF No. 76 at 4-6.)

At the suppression hearing, the Government presented the testimony of Agent Arnold Bernard, Sr.—a retired FBI agent and detective with the Cambria County District Attorney's Office. (*See* ECF No. 84.) Mr. Gulley presented three exhibits and cross-examined Detective Bernard, but did not present any witnesses. (*See id.*)

## **II. Findings of Fact**

The Court makes the following findings of fact based on the evidence and testimony presented at the suppression hearing on April 24, 2019.<sup>1</sup>

### **A. The Southwest Pennsylvania Safe Streets Task Force**

1. The Southwest Pennsylvania Safe Streets Task Force (the “Task Force”) is a task force initiated by the Federal Bureau of Investigation (FBI) where federal, state, and local law officials work to combat drugs and violent crimes. (ECF No. 84 at 4:10-17.)
2. The Task Force is a federally funded task force. (*Id.* at 5:24-6:9.)
3. The FBI supervises the operations of the Task Force. (*Id.* at 9:24-25.)
4. The participating law enforcement agencies generate incident reports for activities related to the Task Force on their own letterhead, and then submit those reports to the FBI, which scans them into the FBI computer system. (*Id.* at 8:7-22.)
5. The United States Attorney’s Office handles prosecutions: (1) that involve individuals on federal supervised release for prior drug convictions; (2) in cases where the weight of seized drugs justify federal prosecutions; and (3) where the offender would qualify as a career offender under federal law. (*Id.* at 10:14-11:4.)

---

<sup>1</sup> The transcript of the suppression hearing is docketed at ECF No. 84.

6. When the Task Force undertakes an investigation, the members of the Task Force must follow federal rules and FBI rules. (*Id.* at 11:8-14.)

**B. Arnold Bernard, Sr.'s Background and Experience**

7. Arnold Bernard, Sr. is employed as a detective for the Cambria County District Attorney's Office. (*Id.* at 3:7-8.)
8. Detective Bernard was employed by the FBI as a special agent for more than 30 years. (*Id.* at 3:21-4:9.)
9. Detective Bernard was stationed at the FBI's Laurel Highlands office from 1999 until December of 2016. (*Id.* at 4:2-4.)
10. As an FBI special agent, Detective Bernard was the supervisor of the Task Force for approximately 12 years. (*Id.* at 4:7-9.)
11. As of May 8, 2019, Detective Bernard is a deputized part-time member of the Task Force. (*Id.* at 7:10-14.)
12. As a member of the Task Force, Detective Bernard collected Memorandums of Understanding from state and local law enforcement officers and submitted them to the FBI. (*Id.* at 6:24-7:3.)
13. When working for the Task Force, Detective Bernard submits Cambria County detective incident report forms to the FBI. (*Id.* at 7:18-8:4.)
14. After retiring as an FBI special agent, Detective Bernard "supervise[s] the county end and provide[s] that [documentation

and information] to [FBI] Agent Simpson who took over [Detective Bernard's former] position as supervisor of the task force for the Federal Bureau of Investigation." (*Id.* at 10:8-10.)

15. Detective Bernard has been involved in more than 1,000 controlled drug buys as a member of the Task Force. (*Id.* at 22:8-10.)

**C. Willie Gulley, Jr.'s Background**

16. Defendant Willie Gene Gulley, Jr. was convicted of federal drug offenses twice before March of 2018. (*Id.* at 16:3-25.)
17. Detective Bernard, through his work as an FBI special agent, knew Mr. Gulley as a prior federal drug offender. (*Id.* at 15:18-25.)
18. As of March 2018, Mr. Gulley was on federal supervised release. (*Id.* at 16:25.)

**D. The Southwest Pennsylvania Safe Streets Task Force Apprehends Mr. Gulley**

19. In June of 2017, the Task Force became aware of potential drug activity involving Mr. Gulley through complaints to a drug hotline about drug activity at Mr. Gulley's address—214 Kunkle Street, Johnstown, Pennsylvania. (*Id.* at 17:11-15.)
20. The Task Force determined that the investigation into complaints about drug activity involving Mr. Gulley would be a federal investigation because Mr. Gulley had previously been convicted of

federal drug crimes, was on federal supervised release, and was a “career criminal.” (*Id.* at 17:16-18:3.)

21. In February of 2018, an unnamed individual was arrested during a drug interdiction. That individual offered to purchase heroin from “Head” — Mr. Gulley’s street name — as a confidential informant. (*Id.* at 18:6-17.) Detective Bernard was aware that “Head” was a street name for Mr. Gulley. (*Id.*)
22. As of February 2018, the Task Force was conducting surveillance on Mr. Gulley. (*Id.* at 18-25.)
23. The Task Force utilized the confidential informant to conduct controlled drug buys from Mr. Gulley on March 1, 2018 and March 20, 2018. (*Id.* at 19:2-15.)
24. The confidential informant was not consensualized on video before the March 1, 2018 controlled drug buy from Mr. Gulley. (*Id.* at 36:20-37:7.)
25. The confidential informant was consensualized on video before the March 20, 2018 controlled drug buy from Mr. Gulley. (*Id.* at 37:14-38:2.) Detective Hinterliter activated the video recording for the consensualization of the confidential information for the March 20, 2018 controlled buy. (*Id.* at 37:8-13.) In the video, Detective Hinterliter identified himself as a detective with the Cambria County District Attorney’s Office. (*Id.* at 37:14-18.)

26. All law enforcement officers involved in the controlled drug buys on March 1, 2018 and March 20, 2018 were acting in their capacity with the Task Force. (*Id.* at 20:13-17.)
27. In the controlled drug buys on March 1, 2018 and March 20, 2018, Mr. Gulley supplied the confidential information with heroin. (*Id.* at 12:17.)
28. An unwitting individual named Mr. Huddleston was involved in the controlled drug buys on March 1, 2018 and March 20, 2018. (*Id.* at 21:18-22:2.) Mr. Huddleston was the “intermediary” or “go-between” that enabled the confidential informant to purchase heroin from Mr. Gulley. (*Id.* at 22:3-6.)
29. Law enforcement officers created incident reports after the controlled buys from Mr. Gulley. (*Id.* at 26:14-31:12.) The first two incident reports—numbers 2018-0247 and 2018-0318—are on Cambria County Detective Bureau letterhead. (*Id.* at 26:14-31:12.) The reports do not mention the Task Force or that they were part of a federal law enforcement investigation. (*Id.* at 26:14-31:12.) The third incident report—number 2018-0334—mentions the Task Force and federal law enforcement’s involvement.<sup>2</sup> (*Id.* at 30:23-31:25.)

---

<sup>2</sup> At the suppression hearing, incident report number 2018-0247 was marked as Defendant’s Exhibit 1, number 2018-0318 was marked as Defendant’s Exhibit 2, and number 2018-0334 was marked as Defendant’s Exhibit 3.

30. FBI agents accompanied state and local law enforcement officers during one of the controlled buys on either March 1, 2018 or March 20, 2018. (*Id.* at 19:16-25.)
31. The suspected heroin obtained from Mr. Gulley in the controlled buys was stored in the Cambria County Detective evidence locker before being transported to the Pennsylvania State Police crime lab. (*Id.* at 30:12-17.)
32. On March 21, 2018, Detective Bernard obtained a federal complaint and arrest warrant for Mr. Gulley. (*Id.* at 31:17-20.)
33. On March 21, 2018, members of the Task Force and members of the Cambria County Drug Task Force met to review a plan for arresting Mr. Gulley. (*Id.* at 32:10-13.)
34. Detective Bernard provided the FBI with reports related to the investigation and arrest of Mr. Gulley. (*Id.* at 33:11-34:3.)

### **III. Conclusions of Law**

#### **A. Legal Standard**

Mr. Gulley alleges that the Government violated the Federal Wiretap Act by unlawfully intercepting oral communications in connection with the controlled drug buys on March 1, 2018 and March 20, 2018. (ECF No. 85 at 1.) The Federal Wiretap Act makes it illegal to use the contents of any wire, oral, or electronic communication where the information was obtained through an interception in violation of 18 U.S.C. § 2511.<sup>3</sup> 18

---

<sup>3</sup> 18 U.S.C. § 2511(1) provides that:



U.S.C. § 2511(1); *United States v. Antoon*, 933 F.2d 200, 203 (3d Cir. 1991). Under 18 U.S.C. § 2511, it is not unlawful for a person acting under color of law to intercept a communication where a party to that communication has given prior consent.<sup>4</sup> 18 U.S.C. 2511(2)(c); *Antoon*, 933 F.2d at 203.

Mr. Gulley also alleges that the Government's interceptions of his communications violated the Pennsylvania Wiretap Act. (ECF No. 85 at 8.) Under the Pennsylvania Wiretap and Electronic Surveillance Control Act (the "Pennsylvania Wiretap Act"), it is illegal to "intentionally intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire, electronic, or oral communication." 18 PA. CONS. STAT. § 5703; *see* § 5704 (listing exceptions to the general prohibition). "Any aggrieved person who is a party to any proceeding in any court, board, or agency of this Commonwealth may move to exclude the contents of any wire, electronic, or oral communication, or evidence derived therefrom." 18 PA. CONS. STAT. § 5721.1(b).

"[B]ecause the protections of the [Pennsylvania] Wiretap Act emanate from the speaker's right to privacy, all of the Act's provisions are to be strictly construed.

---

(1) Except as otherwise specifically provided in this chapter any person who—  
 (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;  
 shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

<sup>4</sup> 18 U.S.C. 2511(2)(c) provides that "[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

Accordingly, any interception by law enforcement officers not carried out in accordance with the exceptions of Section 5704 subjects all resulting evidence to suppression.” *Comm. v. Rosa*, 21 A.3d 1264, 1269 (Pa. Super. Ct. 2011).

In cases involving Sections 5703 and 5704 of the Pennsylvania Wiretap Act, the Third Circuit has found that “[t]he provisions of Pennsylvania’s Wiretap Act . . . are substantially the same as the provisions of the Federal Wiretapping Act” and that the “state wiretap act is interpreted in the same way as the federal Act.” *Walsh v. Krantz*, 386 F. App’x 334, 340 (3d Cir. 2010) (citing *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 n.6 (3d Cir. 2003)).

However, the Pennsylvania Wiretap Act is preempted by the Federal Wiretap Act where provisions in the two acts conflict.<sup>5</sup> See, e.g., *Bansal v. Russ*, 513 F. Supp. 2d 264, 283 (E.D. Pa. 2007) (citing the Federal Wiretap Act, 18 U.S.C. § 2510 et seq.). In *Bansal*, the Court noted that when only one party to a communication consents to its recording, 18 PA. CONS. STAT. § 5704(2)(ii) requires law enforcement to obtain the approval of the Pennsylvania Attorney General or a District Attorney before the warrantless recording of the communication. *Id.* Under federal law, on the other hand, law enforcement may intercept a communication without a warrant so long as one party to the communication consents to its interception. *Id.* (citing 18 U.S.C. § 2511(2)(c)-(d)). Thus, the Court in *Bansal* held that

---

<sup>5</sup> The Court notes that it is unclear whether the Federal Wiretap Act expressly preempts state law, but finds it unnecessary to reach a conclusion on that issue. See *Ideal Aerosmith, Inc. v. Aceutronic USA, Inc.*, No. 07-1029, 2008 WL 1859811, at \*3 (W.D. Pa. Apr. 23, 2008) (declining to hold that the Federal Wiretap Act expressly preempts the Pennsylvania Wiretap Act). Here, it is clear that “conflict preemption” applies because there is an actual conflict between the provisions in the state and federal laws. For a general discussion on conflict preemption, see *Diehl v. CSX Transp.*, No. 3:18-cv-122, 2018 WL 4705781, at \*4 (W.D. Pa. 2018) (Gibson, J.) (citing *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008); *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

“state law would stand as an obstacle to federal law enforcement” and that “federal officers participating in a federal investigation are not required to follow the Pennsylvania Wiretap Act.”<sup>6</sup> *Id.*; see also *Blue Marsh Labs, Inc.*, 2012 WL 1900552, at \*5 (E.D. Pa. May 24, 2012) (“To the extent that Pennsylvania’s wiretap law conflicts with federal law, Pennsylvania’s law is preempted. Therefore, the recorded call is not subject to suppression.”).

Moreover, “federal district courts will decide evidence questions in federal criminal cases on the basis of federal, rather than state, law.” *United States v. Williams*, 124 F.3d 411, 428 (3d Cir. 1997) (quoting *United States v. Rickus*, 737 F.2d 360, 363 (3d Cir. 1984)).

#### **B. The Parties’ Arguments**

Mr. Gulley argues that the Government unlawfully intercepted wire communications involving Mr. Gulley and that the Court must suppress all evidence obtained as a result of the unlawfully intercepted communications. (ECF No. 85 at 1.) First, Mr. Gulley contends that Detective Bernard should not have been permitted to testify about the Memorandums of Understanding between local law-enforcement agencies and the FBI because those agreements were hearsay. (*Id.* at 7-8.) Because the Government did not present a witness from the FBI or United States Attorney’s office to testify on the relationship between state and federal law enforcement, Mr. Gulley argues that the Government cannot show that Detective Bernard and the other officers involved were acting in a federal capacity. (*Id.*)

---

<sup>6</sup> Courts in other circuits have similarly found that the Federal Wiretap Act preempts conflicting state law provisions. See *U.S. v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976) (holding that “federal officers are authorized to wiretap under [18 U.S.C. § 2516], regardless of provisions of state law”); *U.S. v. McNulty*, 729 F.2d 1243, 1262 (10th Cir. 1983) (“[T]he federal statute specifically permits introduction of consensual recordings and thus controls conflicting state eavesdropping regulations.”).

Second, Mr. Gulley argues that the Federal Wiretap Act does not apply because the law-enforcement officers involved in surveilling and arresting Mr. Gulley were acting as state, and not federal agents. (*Id.* at 7-8; ECF No. 76 at 4-5.) Mr. Gulley points out that the officers who investigated Mr. Gulley were acting in their capacity as agents on the Cambria County Drug Task Force, which operates under the guidance of the Cambria County District Attorney and Pennsylvania Attorney General. (ECF No. 85 at 8-9.) Mr. Gulley emphasizes that there is no evidence that these officers acted in a federal capacity in their investigation of Mr. Gulley. (*Id.*) Therefore, Mr. Gulley argues that the Pennsylvania Wiretap Act, and not the Federal Wiretap Act, applies in this case. (*Id.*) And because the Pennsylvania Wiretap Act requires that both parties consent to the interception of wire communications, Mr. Gulley argues that the intercepted communications here—to which only one party consented to the interception—must be suppressed.

Third, Mr. Gulley argues that even if the Federal Wiretap Act applies, the interceptions were unlawful because “the Government failed to prove that the confidential informant was consensualized for even a one-party consent.” (*Id.* at 9; *see also* ECF No. 76 at 4.) Mr. Gulley argues that the Government failed to comply with 18 U.S.C. § 2516, which requires law enforcement and the United States Attorney to present a federal judge with a written application for a wiretap. (ECF No. 85 at 9.)

The Government’s response rebuts Mr. Gulley’s arguments in a single paragraph. (ECF No. 90 at 4.) The Government argues that the investigation into Mr. Gulley’s drug activity was conducted by the FBI-led federal Southwest Pennsylvania Safe Streets Task Force. (*Id.* at 5.) The Government therefore contends that the Pennsylvania Wiretap Act

does not apply. (*Id.*) It further argues that the surveillance of Mr. Gulley complied with the Federal Wiretap Act because one party's consent is an exception under 18 U.S.C. § 2511. (*Id.*)

**C. The Government Did Not Properly Introduce Evidence of Memorandums of Understanding Between Local Law Enforcement and the FBI**

Mr. Gulley contends that “[t]he documents and interagency agreements testified to by Detective Bernard were hearsay” under Federal Rule of Evidence 801(c).<sup>7</sup> (ECF No. 85 at 7.)<sup>8</sup> The Court agrees and finds that the Government did not properly introduce evidence of the Memorandums of Understanding between local law enforcement agencies and the FBI.

As a preliminary matter, the Memorandums of Understanding are hearsay. The documents contain out-of-court statements that the Government offered for their truth—that the local law-enforcement agencies and the FBI agreed to operate a joint task force. It is not clear that any exceptions to the rule against hearsay apply here. Under the public-records exception to the rule against hearsay, Federal Rule of Evidence 803(8), a record or statement of a public office is admissible if it sets out the office's activities and “the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.” FED. R. EVID. 803(8). Moreover, the business-records exception in Federal Rule of Evidence 803(6) sometimes applies to law-enforcement documents. FED. R.

---

<sup>7</sup> “Hearsay means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c). Hearsay is not admissible unless a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court provide otherwise. FED. R. EVID. 802.

<sup>8</sup> In its response to Mr. Gulley's post-hearing brief, the Government did not respond to this argument. (See ECF No. 90.)



EVID. 803(6). However, the Court will not reach a definitive conclusion on this issue because the Government did not introduce the memorandums themselves into evidence.

Evidence regarding the Memorandums of Understanding is inadmissible because the Government did not introduce the memorandums themselves. Under Federal Rules of Evidence 1002 and 1003, a party must introduce a copy of a writing in order to prove its contents.<sup>9</sup> FED. R. EVID. 1002, 1003. Here, Detective Bernard testified about the contents of the Memorandums of Understanding. He testified that local law enforcement agencies sign the memorandums “with the federal government as to what the task force duties are” and that the “memo[s] of understanding [establish] how the task force is going to be run by the federal government, by the FBI.” (ECF No. 84 at 4:12-17, 6:1-9.) Because the Government did not introduce the documents themselves, evidence of the contents of the Memorandums of Understanding is inadmissible.

---

<sup>9</sup> Federal Rule of Evidence 1004 contains exceptions to the requirements of Rules 1002 and 1003. “An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith; (b) an original cannot be obtained by any available judicial process; (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or (d) the writing, recording, or photograph is not closely related to a controlling issue. FED. R. EVID. 1004. None of these exceptions apply here.

**D. The Officers Who Investigated Mr. Gulley Acted in a Federal Capacity**

Although the Government did not properly introduce Memorandums of Understanding, the Court finds that Detective Bernard's testimony otherwise established that he and the other officers investigating Mr. Gulley acted in a federal capacity.

Detective Bernard testified that the Task Force is "an FBI initiated task force which is a collaboration of federal, state, and local law officials who work drugs and violent crimes." (*Id.* at 4:10-14.) This testimony was based on Detective Bernard's firsthand knowledge—he testified that when he was employed by the FBI, he acted as supervisor of the Task Force for approximately twelve years. (*Id.* at 6:18-19, 7:10-11.) Detective Bernard also testified that after he retired from the FBI, he was sworn in as a deputized part-time member of the Task Force. (*Id.* at 7:4-6.)

Detective Bernard further testified that the investigation into Mr. Gulley in 2017 and 2018 was a federal investigation from its inception. (*Id.* at 17:21-23.) The Task Force discussed Mr. Gulley's case at a meeting. (*Id.*) The Task Force took on Mr. Gulley's case because Mr. Gulley was on federal supervised release and had previously been convicted of drug crimes under federal law. (*Id.* at 18:1-3.)

Finally, Detective Bernard testified that the Task Force's federal officers carried out the controlled drug buys from Mr. Gulley on March 1, 2018 and March 20, 2018. (*Id.* at 19:1-13.) The officers involved in the controlled buys—Detectives Hinterliter, Keirn, Arcurio, Hines, and Fye of the Johnstown Police Department—are full-time members of the Task Force. (*Id.* at 9:8-13, 19:16-25.) Detective Bernard testified that FBI agents were also involved during the controlled buys. (*Id.* at 19:21-23.) The arrest reports prepared by

Detectives Bernard and Keirn state that the Task Force carried out the arrest of Mr. Gulley on March 21, 2018. (*Id.* at 30:23-32:9.)

Accordingly, the Court finds that the officers who conducted the controlled buys from Mr. Gulley and eventually arrested him acted in a federal capacity as members of the Task Force. This is consistent with the conclusion that other courts have reached when considering this issue. *See United States v. Jackson*, 849 F.3d 540, 545-551 (3d Cir. 2017) (applying Federal Wiretap Act to interception of communications by state law-enforcement officers working with FBI as part of the Greater Pittsburgh Safe Streets Task Force); *Adams v. Springmeyer*, 17 F. Supp. 3d 478, 506 (W.D. Pa. 2014) (citing *Colo. v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005)) (“Local law enforcement officers working [as federally deputized Task Force officers] are generally regarded as federal agents.”); *Cook v. Drew*, No. 06-38, 2007 WL 3072238, at \*6, n.3 (W.D. Pa. Oct. 19, 2007) (quoting *DeMayo v. Nugent*, 475b F. Supp. 2d 110, 115 (D. Mass. 2007)) (“State police officers deputized as federal agents . . . constitute federal agents acting under federal law.”).

**E. The Interception of Communications Was Permissible Under the Federal Wiretap Act**

The Federal Wiretap Act applies because agents of the Task Force, acting in their federal capacities, investigated and surveilled Mr. Gulley. Under 18 U.S.C. § 2511, “[i]t shall not be unlawful under this chapter for a person acting under color of state law to intercept a wire, oral, or electronic communication, where such person is a party to the



communication or one of the parties to the communication has given prior consent to such interception.”<sup>10</sup> 18 U.S.C. § 2511(2)(c).

Here, Detective Bernard and the other law enforcement officers acted under color of state law. Generally, an individual acts under color of state law when he or she acts using the authority derived from his or her position as a state actor. *Harvey v. Plains Twp. Police Dep’t*, 421 F.3d 185, 189 (3d Cir. 2005) (citing *Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998)). Detective Bernard acted in his capacities as a detective for the Cambria County District Attorney and member of the Task Force. (ECF No. 84 at 14:14-16.) Detective Bernard also testified that the other officers were acting in their capacities as members of the Task Force. (*Id.* at 20:13-18.) Mr. Gulley does not dispute that Detective Bernard and the other officers acted under color of state law when they intercepted communications between Mr. Gulley and the confidential informant.

The Court also finds that the confidential informant consented to the recording of his communications with Mr. Gulley. Detective Bernard testified that the Task Force utilized a consenting confidential informant to make the March 1, 2018 and March 20, 2018 controlled drug buys from Mr. Gulley. (*Id.* at 20:22-24, 37:1-3.) Detective Bernard also testified that the consenting confidential informant acted according to the federal rules and

---

<sup>10</sup> Similarly, 18 U.S.C. 2511(2)(d) provides that “[i]t shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.” This subsection does not apply here, however, because Detective Bernard and the other officers involved in surveilling Mr. Gulley acted under color of state law.

procedures governing the use of confidential informants.<sup>11</sup> (*Id.* at 20:25-21:2.) There is no evidence that the informant was under duress or that Task Force agents failed to follow proper procedures to consensualize the informant.

Accordingly, the Court finds that the Government's interception of communications between Mr. Gulley and the confidential informant were permissible under the Federal Wiretap Act.

#### F. The Pennsylvania Wiretap Act Does Not Apply in this Case

Courts have consistently held that the Pennsylvania Wiretap Act is preempted by the Federal Wiretap Act when the provisions of the two acts conflict. *See Blue Marsh Labs*, 2012 WL 1900552, at \*5; *Bansal*, 513 F. Supp. 2d at 283; *United States v. Felton*, 592 F. Supp. 172, 193 (W.D. Pa. 1984) ("As long as federal law is satisfied and federal standards of reasonableness are met, the evidence is admissible despite the fact that the interception, *per se*, was a violation of state law."); *United States v. Armocida*, 515 F.2d 49, 52 (3d Cir. 1975) (citing *On Lee v. United States*, 347 U.S. 747, 754-55 (1952)) ("So long as the information was lawfully obtained under federal law and met federal standards of reasonableness, it is admissible in federal court despite a violation of state law."); *Comm. v. Lam*, 684 A.2d 153, 165 (Pa. Super. Ct. 1996).

---

<sup>11</sup> The Court recognizes that confidential informants must *voluntarily* consent to the recording of their conversations. *See United States v. Kelly*, 708 F.2d 121, 124-25 (3d Cir. 1983) (citing *United States v. Caceres*, 440 U.S. 741, 744 (1979); *United States v. White*, 401 U.S. 745, 750-51 (1971)). The question of whether an informant voluntarily consented to the recording is a question of fact which the court must determine from the totality of the circumstances. *Kelly*, 708 F.2d at 125 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). Here, there is no evidence suggesting that the confidential informant did not voluntarily consent to the recording of his or her conversations with Mr. Gulley. Accordingly, the Court finds that the confidential informant voluntarily consented to the interception of communications.

Here, the provisions of the Pennsylvania Wiretap Act and the Federal Wiretap Act conflict. The Federal Wiretap Act allows law enforcement to intercept communications with the consent of one party to the communication, while the Pennsylvania Wiretap Act requires the consent of both parties. *Compare* 18 PA. CONS. STAT. § 5704(2)(ii) (requiring law enforcement to obtain consent of both parties before intercepting communications without a warrant) *with* 18 U.S.C. § 2511(2)(c) (“It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”). Accordingly, the Court finds that the Pennsylvania Wiretap Act does not apply here because the provision dealing with consent conflicts with the Federal Wiretap Act. Because the Federal Wiretap Act only requires the consent of one party to a communication, the Court will not suppress the intercepted communications between Mr. Gulley and the confidential informant.

#### **IV. Conclusion**

For the foregoing reasons, the Court finds that the Government did not violate the Federal Wiretap Act or the Pennsylvania Wiretap Act by intercepting communications between Mr. Gulley and a confidential informant. Accordingly, the Court will **DENY** Mr. Gulley’s Motions to Suppress. (ECF No. 46, 76.)

The Government must file a *Starks* motion if it intends to introduce the recorded conversations at trial. *See Blue Marsh Labs*, 2002 WL 1900552, at \*5, n.2 (citing *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

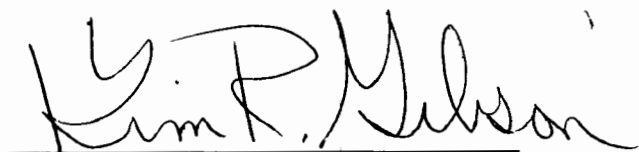
UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 3:18-09
v.	)	
	)	JUDGE KIM R. GIBSON
WILLIE GENE GULLEY, Jr.,	)	
	)	
Defendant.	)	
	)	

ORDER

AND NOW, this 26<sup>th</sup> day of July, 2019, upon consideration of Defendant Willie Gene Gulley, Jr.'s Motions to Suppress (ECF Nos. 46, 76), **IT IS HEREBY ORDERED** that the Motions are **DENIED**. The Court will not suppress evidence of the intercepted communications involving Mr. Gulley.

The Government must file a *Starks* motion if it intends to introduce the recorded conversations at trial. See *Blue Marsh Labs*, 2002 WL 1900552, at \*5, n.2 (citing *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

BY THE COURT:

A handwritten signature in black ink, appearing to read "Kim R. Gibson", written over a horizontal line.

KIM R. GIBSON  
UNITED STATES DISTRICT JUDGE